
INTERIOR BOARD OF INDIAN APPEALS

Estate of Elijah Good Shield

42 IBIA 123 (01/12/2006)

# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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| ESTATE OF ELIJAH GOOD SHIELD | : | Order Affirming Decision |
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| | : | Docket No. IBIA 04-84 |
| | : | |
| | : | January 12, 2006 |

Appellant Clarene A. Stokebrand seeks review of a February 13, 2004 order by Administrative Law Judge (ALJ) Harvey C. Sweitzer denying a petition for reopening in the estate of Elijah Good Shield, deceased Rosebud Sioux Indian, Probate No. B-24-61. That order let stand a January 13, 1961 order by Examiner of Inheritance Lowell A. Wheaton, finding that Decedent was the biological father of three children: Appellant, whose name at the time was Clarene Ann Small Bear; Lawrence Small Bear; and Julian Arlene Mousseau. The order divided Decedent's estate in equal parts among these three individuals. Appellant now seeks a determination that Julian Mousseau is not the daughter of Decedent and is therefore not entitled to share in Decedent's estate. For the reasons discussed below, the Board affirms Judge Sweitzer's decision.

## Background

Decedent died intestate at Winner, South Dakota, on February 21, 1959. Examiner Wheaton scheduled a hearing to probate the estate on October 5, 1959. Among the issues before Examiner Wheaton was whether Decedent had fathered any children. Decedent had been married once, to Lulu Iron Nest, but no children were born of that marriage. Decedent was unmarried at the time of his death and had adopted no children.

The family history provided by the Bureau of Indian Affairs (BIA) for the probate proceedings listed three individuals purported to be Decedent's children: Appellant and Lawrence Small Bear, whose mother was identified as Vera or Ida Marie Small Bear; and Julian Arlene Mousseau, whose mother was Olive (Ollie) Mousseau. All three children were minors at the time of the probate proceedings. The only issue pertinent to these proceedings is the status of Julian Mousseau.

Prior to the hearing, on September 24, 1959, Ollie Mousseau signed an affidavit, submitted to the probate proceedings, in which she stated that she had cohabited with Decedent and that Julian Mousseau was Decedent's daughter. Ollie Mousseau appeared at the October 5, 1959 hearing and was appointed by Examiner Wheaton as Julian's guardian ad litem. However, Examiner Wheaton determined that the other two alleged children, Appellant and Lawrence Small Bear, had not been sufficiently notified of the hearing and ordered it to be continued. Examiner Wheaton stated that he would appoint their mother, Vera Small Bear, to be their guardian ad litem at the future hearing.

Examiner Wheaton scheduled a second hearing on Decedent's estate on March 29, 1960. Notice of the hearing was mailed to Vera Small Bear as guardian ad litem for Appellant and Lawrence Small Bear, but no one appeared on behalf of Appellant or Lawrence at the hearing.

At the hearing, two witnesses testified that Julian Mousseau was Decedent's daughter. Lillian Beads, identified as a life-long acquaintance of Decedent, testified that Decedent had told her that he was Julian's father. Ollie Mousseau, Julian's mother, testified that Decedent was Julian's father. She stated that she had lived with Decedent for three days in September 1946 and that Julian was born in June 1947. One witness — Odell Good Shield, a relative of Decedent — testified that Decedent had said that Julian was not his child.

Examiner Wheaton scheduled another hearing for September 12, 1960. Notice was sent to both Vera Small Bear and Ollie Mousseau (among others) but no one appeared at the hearing and it was continued.

On September 21, 1960, George Scott — then the husband of Vera Small Bear and stepfather to Appellant and Lawrence Small Bear — signed an affidavit, witnessed by Examiner Wheaton. The affidavit set forth the text of a question and answer session between George Scott and Examiner Wheaton, in which George Scott stated that Decedent was the biological father of Appellant and Lawrence Small Bear. George Scott further stated that he had a court order naming him as the guardian of Appellant, who was living with him at the time.

Examiner Wheaton held an additional hearing on January 9, 1961. George Scott did not attend, but his affidavit was admitted into evidence at the hearing. Only Ollie Mousseau attended this hearing.

Examiner Wheaton issued an Order Determining Heirs on January 13, 1961. Examiner Wheaton found that Decedent had cohabited intermittently with Vera Small Bear

and Ollie Mousseau between 1945 and 1948. He found that Decedent had two children with Vera Small Bear — Appellant and Lawrence Small Bear — and one child with Ollie Mousseau — Julian Mousseau. Examiner Wheaton determined that Decedent's estate was to be distributed equally among the three children.

Notice of the order was distributed, including to George Scott as guardian ad litem for Appellant and Lawrence Small Bear. No petitions for rehearing were filed. The order became final on March 13, 1961, at which time Examiner Wheaten ordered BIA to distribute the estate.

The current action begins some 34 years later when, by letter dated April 24, 1995, Dakota Plains Legal Services wrote to the Superintendent of the Rosebud Agency, BIA (Superintendent) on behalf of Appellant, requesting that Decedent's estate be reviewed by an ALJ based on newly discovered evidence. The Legal Services letter attached two affidavits obtained by Appellant, one questioning the veracity of Lillian Beads' testimony at the March 29, 1960 probate hearing before Examiner Wheaton and stating that Decedent had said he was not the father of Julian Mousseau, and the other stating that Decedent had said he had only one daughter, with the last name of Scott.

In response, the Superintendent — acting on behalf of Appellant — filed with the Interior Department's Office of Hearings and Appeals a "petition for reconsideration and rehearing," dated May 12, 1995. The petition stated that "[n]ewly discovered evidence has been obtained indicating that a manifest injustice could occur in that [Julian] * * * is not the biological daughter of [Decedent] and that a reasonable possibility exists for correction of the error." The petition explained that Appellant was a minor at the time of the original probate hearings and that Appellant felt that her "best interests were not protected." Attached to the petition were the two affidavits submitted by Appellant.

On August 4 and November 27, 1995, the Superintendent submitted on behalf of Appellant a total of 12 additional affidavits from various individuals regarding Julian Mousseau's paternity and the veracity of Lillian Beads' 1960 testimony.

On February 13, 2004, Judge Sweitzer issued an Order Denying Petition for Reopening. Judge Sweitzer found that Appellant had failed to meet the regulatory requirements for a petition for reopening filed more than three years after the entry of the final decision in a probate case. Specifically, he found that Appellant should be deemed to have received notice of the original probate proceedings because notice was provided to her guardian ad litem, George Scott, who he determined had adequately represented her interests in those proceedings.

Judge Sweitzer also found that Appellant had failed to diligently pursue her claim, a Board-imposed consideration in determining whether to reopen a probate proceeding. Judge Sweitzer found Julian Mousseau would be prejudiced by Appellant's delay in seeking to reopen Decedent's estate because Examiner Wheaton's determination that Decedent was Julian's father rested in part on the testimony of Lillian Beads, who had since died. Judge Sweitzer concluded that, in Lillian Beads' absence, Julian would not be able to challenge the multiple affidavits that attempted to impeach Lillian Beads' testimony.

Appellant appealed to the Board and filed an opening brief. No other briefs were filed. However, shortly after the filing of the notice of appeal, Julian Mousseau, through counsel, wrote a letter to BIA's Great Plains Land Titles & Records Office opposing the reopening of Decedent's estate, which was included in the record forwarded by BIA to the Board. The Board will consider the arguments in this letter to be in the nature of an answer brief.

## Discussion

A petition for reopening that is filed more than three years after the entry of a final probate decision shall be allowed "only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted." 43 C.F.R. § 4.242(h) (1995). 1/

For the purposes of 43 C.F.R. § 4.242(h), the Board has held that a minor represented by a guardian ad litem is charged with notice sent to that guardian, where the guardian ad litem appeared at the probate hearing on the minor's behalf and adequately represented the minor's interests. See Estate of Eugene Patrick Dupuis, 11 IBIA 11, 12 (1982); Estate of Katie Crossguns, 10 IBIA 141, 144 (1982).

In this appeal, Appellant argues that she cannot be deemed to have received notice of the original probate proceedings because she was 11 years old at the time of those proceedings and was unaware of their existence; that George Scott could not be deemed her

1/ The petition for reopening was filed by the Superintendent, not Appellant. While the Superintendent may seek reopening under 43 C.F.R. § 4.242(h), the interested party on whose behalf the Superintendent files cannot avoid the regulatory requirements pertaining to reopening by virtue of having the Superintendent handle the filing. See Estates of Alice Senoya Luna and Guadaloupe Luna, 33 IBIA 283, 288 n.3 (1999).

legal guardian because of his alleged abuse and poor treatment of her; and that George Scott did not adequately represent her interests because he did not appear at any of the official probate hearings.

The Board agrees with Judge Sweitzer that Appellant must be deemed to have received notice of the original probate proceedings. Appellant does not seriously dispute that George Scott was her legal guardian, but rather makes representations about the quality of his guardianship. Assuming that Appellant's statements concerning the difficult circumstances of her childhood are true, the Board is sympathetic, but those circumstances are not pertinent to the question of George Scott's legal status as her guardian. Appellant provides no evidence to counter George Scott's affidavit, sworn before Examiner Wheaton, stating that he had a court order naming him Appellant's guardian. Moreover, regardless of George Scott's legal status, he was deemed to be Appellant's guardian ad litem by Examiner Wheaton, which is sufficient to determine that he was designated to be her legal representative in those proceedings.

Nor does Appellant establish that George Scott failed to adequately represent her interests in the probate proceedings. To the contrary, George Scott attested in those proceedings that Appellant was the biological daughter of Decedent, evidence that appears to be largely responsible for the award of one-third of Decedent's estate to her. Under the particular circumstances here, the Board concludes that it is immaterial that George Scott did not physically attend the probate hearings, given that (1) he had appeared before Examiner Wheaton who questioned him and witnessed his affidavit; (2) his affidavit attesting to Appellant's paternity was admitted into evidence despite his absence; and (3) there was no challenge to George Scott's affidavit and thus no need for him to be present to defend his statement.

The Board also finds that it is immaterial that George Scott did not attend the hearing at which testimony was presented regarding Julian Mousseau's paternity and that he took no steps to challenge Ollie Mousseau's claim that Decedent was Julian's father. The mere fact that George Scott did not seek to undermine other claims against Decedent's estate does not demonstrate that he did not adequately represent Appellant's interests. A guardian ad litem may provide adequate representation without taking every conceivable step to further the minor's interests. Cf. Estate of Eugene Patrick Dupuis, 11 IBIA at 12 & 13 n.1 (finding guardian ad litem adequately represented minor even where guardian did not seek to develop or present additional evidence supportive of minor's interests). Appellant herself did not question the finding that Decedent was Julian Mousseau's father for 34 years and provides no reason to conclude that George Scott had or should have had any knowledge pertaining to Julian's paternity or should have investigated the matter at the time of the probate hearing. In addition, Examiner Wheaton's questioning of several

witnesses on the paternity of Julian Mousseau helped assure the protection of Appellant's interests and offsets potential concerns that she may have been prejudiced by her guardian ad litem's representation. See Estate of Katie Crossguns, 10 IBIA at 144.

Appellant also challenges Judge Sweitzer's finding that she did not act diligently to pursue her claim, stating that she only learned of questions about Julian Mousseau's paternity when she moved back to the reservation in 1990. Because the Board affirms Judge Sweitzer's order on other grounds, we do not address the question of due diligence. However, we note that — regardless of whether Appellant acted with diligence — the change in circumstances that occurred during the lengthy period between the entry of the original probate order and the time that Appellant sought to reopen the Decedent's estate counsels against reopening. 2/

The Board, in determining whether to reopen long-closed estates, has sought to balance the interests of the various parties affected. See Estate of George Dragswolf, Jr., 30 IBIA 188, 196 (1997); Estate of David Marksman, 5 IBIA 56 (1976). That is because there is a substantial interest of Indian heirs and devisees in the finality of Indian probate decisions affecting their property rights. Estate of George Dragswolf, Jr., 30 IBIA at 196. Accordingly, the Board in ruling on petitions for reopening has considered a variety of factors that may be implicated by the passage of time, including whether individuals with knowledge of the facts or who might be expected to oppose a petition to reopen have died before the filing of the petition. See Estate of Julius Benter (Bender), 17 IBIA 86, 90 (1989); Estate of Frank Pays, 10 IBIA 61, 62 (1982); cf. Estate of Jason Crane, 12 IBIA 165 (1984) (petition allowed where elderly individuals who would be expected to oppose petition were still living).

To the extent that the affidavits supplied by Appellant provide any information relevant to Julian Mousseau's paternity, they are almost universally hearsay and rely on statements made by Decedent, Lillian Beads, and Ollie Mousseau, all of whom are deceased

2/ Consistent with the Board's view here, Julian Mousseau argues that reopening should be denied under principles of laches. Specifically, she asserts that reopening Decedent's estate would be "at great prejudice" to her, because the witnesses who testified on her behalf at the original probate hearings are now deceased.

and not available to rebut or verify the truth of such statements. 3/ As Judge Sweitzer concluded, Julian Mousseau would be unfairly prejudiced by the conduct of proceedings that challenged Examiner Wheaton's 1961 order based on claims of untruthful testimony by individuals who are no longer available to defend their statements. None of the affidavits provide testimony of Julian's paternity based on personal knowledge. Under these circumstances, the interests in maintaining the finality of the original probate decision outweigh the interests in exploring whether there may have been an error in that decision. 4/

## Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms Judge Sweitzer's February 13, 2004 Order Denying Petition for Reopening.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

3/ Some of the statements report that Julian Mousseau herself stated that she did not know who her father was and did not believe she had any brothers and sisters, but Julian herself would not be expected to know and could not know from personal knowledge who her father was. Her lack of knowledge would merely seem to indicate the failure of Ollie Mousseau to tell her who her father was, the significance of which cannot be evaluated without an opportunity for an explanation by Ollie Mousseau herself.

4/ Appellant also asks the Board to order DNA testing to determine Julian Mousseau's paternity, but the Board lacks authority to order such testing. See Estate of Louis Williams, 39 IBIA 99 (2003).